(6) (9)

Nos. 88-1182, 88-6651.

FILED
JUN 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1988.

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER,
v.
JACQUELINE BOUKNIGHT,
RESPONDENT.

MAURICE M.,
PETITIONER,
v.
JACQUELINE BOUKNIGHT,
RESPONDENT.

CORRECTED COPY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

Brief of the Commonwealths of Massachusetts and Pennsylvania, and of the States of Alaska, Arizona, California, Connecticut, Delaware, Illinois, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, South Dakota, South Carolina, Vermont, Virginia, West Virginia, and Wyoming, as *Amici Curiae* in Support of Petitioners.

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BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
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JACQUELINE BOUKNIGHT,
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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA, AND OF THE STATES OF ALASKA, ARIZONA, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, KANSAS, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OREGON, SOUTH DAKOTA, SOUTH CAROLINA, VERMONT, VIRGINIA, WEST VIRGINIA, AND WYOMING, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The States identified above submit this brief amici curiae in support of petitioner. The States have a compelling interest in protecting

children from abuse and neglect. To serve that interest, the States have created departments or agencies to receive reports of suspected abuse or neglect, to conduct investigations, and to provide protective services to children and families.[1/]

On the basis of their experience, amici have come to the conclusion that the direct access of these agencies to suspected victims of child abuse or neglect is crucial to the effectiveness of their efforts to protect such children. In most cases amici must depend for such access on the cooperation, whether voluntary or

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1/ See, e.g., Mass. Gen. L. ch. 119, §§ 51A-B; 29 Del.C. ch. 90. See also DeShaney v. Winnebago County DSS, 109 S.Ct. 998, 1010-11 (1989) (Brennan, J., dissenting) (describing Wisconsin statutory scheme); Darryl H. v. Coler, 801 F.2d 893, 895-96 (7th Cir. 1986) (describing Illinois statutory scheme and practice).

compelled, of the child's parents or other custodians. For the reasons set forth, infra, amici believe that affirmance by this Court of the judgment below would drastically impair their ability to provide protection for children in jeopardy.

SUMMARY OF ARGUMENT

I. The States have a compelling interest in protecting children. That interest is effectuated through non-criminal statutory schemes which require child protection agencies, such as a Department of Social Services (hereafter, "DSS"), to determine whether the child's health or safety is in immediate danger. See pp. 11-13, infra. The expressed and practical purpose of these statutory schemes is protective, not penal. See pp. 14-17 infra.

The most efficient and effective tool that a child protection agency has to investigate cases of suspected child abuse is direct visual observation. Direct observation enables the investigator to determine quickly and accurately whether the physical evidence supports a report of abuse, and whether the child is in immediate danger. After the initial investigation, direct observation also permits effective monitoring of the child's continued well-being. See pp. 18-21, infra.

Child protection agencies depend upon the cooperation, either voluntary or compelled, of the child's custodian in order to undertake a visual observation of the child. See pp. 21-23, infra.

One of the tools that child protection agencies find instrumental to

overcome the resistance of non-cooperative parents is the ultimate threat of a court order to produce the child. It is the collective view of child protective agencies that the very availability of a court order, and the attendant contempt power of the court, contribute to the agencies' ability to persuade most parents to permit access voluntarily. In a small percentage of cases, of course, actual resort to a court order is necessary. See pp. 23-25, infra.

If this Court affirms the judgment below, the States' ability to gain access to children in situations of jeopardy will be impaired, with potentially life-threatening consequences to those children. See pp. 25-27, infra.

II. The Fifth Amendment is not violated by the compelled compliance

with an order to produce the child, because the act of production is not testimonial. Rather, the order merely requires the respondent to become a source of what may become real or physical evidence. See pp. 27-29, infra.

The order to produce the child physically is not the same as an order to disclose his whereabouts. See pp. 30-32, infra. The only arguably testimonial components of the respondent's production of the child would be the acknowledgement that the child is Maurice (the subject of the child protection proceeding) and that the respondent has sufficient control over him to produce him. But these communications are self-evident "foregone conclusions" which do not rise to the level of testimony within the protection of the Fifth Amendment. See pp. 32-33, infra.

Production of the child is not the equivalent of production of the corpus delicti. In contrast to an order to produce something the possession of which is a crime itself (such as cocaine, or a forged alien registration card), here the order to produce is essentially neutral, and the aim of the order is to assure the child's protection, not to secure evidence. See pp. 33-36, infra.

The Maryland Court of Appeals erred when it concluded that production of the child was testimonial because it may lead to incriminating evidence of child abuse. If production is not testimonial, and therefore is unprotected by the privilege, it does not become testimonial merely because it may lead to incriminating evidence. Compelling production of the child for

examination is no different from requiring an individual to make himself available for a blood alcohol test, or to give a handwriting or voice exemplar, or to stand in a line-up. See pp. 36-37 infra.

Further, the respondent has refused to produce Maurice, but has never asserted that she cannot produce him. Where the act is nontestimonial, punishment for the refusal to act violates no Fifth Amendment right. See pp. 37-38, infra.

III. Assuming arguendo that the production of the child is "testimonial," then this Court should recognize the compelling societal interest in protecting children and tip the balance between the respondent's rights and the child's rights in favor of protecting the child in jeopardy. See pp. 40-42, infra. The statutory

scheme is not directed at a "highly selective group inherently suspect of criminal activities." Rather, it is primarily protective, not penal, in purpose. See pp. 44-47, infra. Thus, the compelling interest in favor of production outweighs whatever limited incriminating effect production of the child might cause for the parent or custodian. See pp. 47-48, infra.

IV. The extension of immunity from prosecution to a recalcitrant parent is not an acceptable solution to the States' need to protect children in this kind of situation. The States should not be required to choose between protecting children and punishing their abusers. Child abusers should not be able to extract immunity in exchange for production: the incentive to hide the child would become too great. See pp. 48-49, infra.

Moreover, the extension of immunity would not guarantee cooperation by the parent or custodian and expeditious access to the child. If granted use immunity, the parent or custodian might refuse to cooperate for fear that a prosecution may follow in any event on the basis of information from independent sources. If granted transactional immunity, the parent or custodian, recognizing she has full immunity, might give incomplete or misleading information. See pp. 49-52, infra.

Immunity, whether use or transactional, does not, as a practical matter, ensure cooperation. There may be other reasons the parent or custodian is not cooperating: fear of reprisal; fear of losing parental rights; or fear of personal disgrace. See pp. 52-54, infra.

Finally, immunity may not always be available under state law and, if available, may be difficult to obtain. In child abuse cases, child protection agencies must be able to move promptly to ensure that children at risk are protected. See pp. 54-57, infra.

For these reasons, the judgment of the Maryland Court of Appeals must be reversed.

ARGUMENT

I. THE STATE'S INTEREST IN PROTECTING CHILDREN FROM ABUSE AND NEGLECT MAKES PHYSICAL ACCESS TO CHILDREN AT RISK A NECESSITY.

Child abuse and neglect is a severe and widespread problem affecting large numbers of children. See generally Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988); Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986). Incidents of suspected abuse or neglect are reported

to child protection agencies at annual rates in the tens of thousands.[2/]

2/ For example, during 1987, the Massachusetts Department of Social Services received reports of suspected abuse or neglect of 52,391 children. Reports regarding 68% of these children, or 33,832 children, were "screened in" (see Mass. Regs. Code tit. 110 § 4.21 (1988): reports are "screened out" where the perpetrator is not a caretaker; where the alleged acts of abuse took place too long ago; or where the report has been determined unreliable) and investigated. These investigations resulted in determinations that allegations of abuse or neglect were "substantiated" with respect to 17,399 children, or 51% of the children investigated (see Mass. Regs. Code tit. 110 § 4.03 (13) (1987): substantiated means "to find that there is some credible evidence of a reportable condition." In 1988, the Massachusetts DSS amended the word "substantiated" to "supported," which term means "that the Department has reasonable cause to believe that an incident of abuse or neglect by a caretaker did occur." Mass. Regs. Code tit. 110 § 4.32 (2)). 2477 of the 17,399 children, or 5% of the children reported, required emergency intervention. (Child Abuse/Neglect Statistics, January 1 - December 13, 1987, Prepared by Antone C. Felix III, Massachusetts DSS Research Evaluation and Planning Unit, April 1988, on file with Massachusetts DSS.)

Victims of child abuse or neglect suffer physical, mental, or emotional harm, not infrequently including death. See Darryl H. v. Coler, 801 F.2d at 902 ("[i]n 1982, seventy-one children in Illinois died as a result of child abuse");[3/] see, e.g., DeShaney v. Winnebago County DSS, 109 S.Ct. 998 (1989) (child permanently brain-injured from parental abuse). As this Court observed in Wyman v. James, 400 U.S. 309, 318 (1981), "there is no more worthy object of the public's concern" than the care and protection of children.

3/ According to records of the Massachusetts DSS, in the first five months of fiscal year 1989 as many as fifteen children may have died in the Commonwealth as a result of abuse inflicted by their caretakers. (Monthly Report on Chapter 288 Legislation (D.A. Reporting Bill), November 1988 (on file with Massachusetts DSS).

The compelling State interest in protecting children is primarily effectuated through non-criminal statutory schemes. The statutes governing child protection agencies' efforts reflect their purpose to protect children, and the importance the States ascribe to that purpose. Massachusetts law is illustrative. The stated purpose of the Massachusetts statutory scheme "is to insure that the children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes, and to assure good substitute parental care in the event of the absence, . . . inability or unfitness. . . to provide care and protection for their children." Mass. Gen. L. ch. 119 § 1.

Mass. Gen. L. ch. 119, § 51A requires certain professionals, and permits any person, to make reports to DSS upon "reasonable cause to believe" that a child is suffering from abuse or neglect. Upon receiving such a report, DSS must determine whether it has reasonable cause to believe that the child's health or safety is in immediate danger. If so, it must commence its investigation within two hours and complete it within twenty-four hours; otherwise, DSS must commence its investigation within two days and complete it within ten days. Mass. Gen. L. ch. 119, § 51B(1). The investigation "shall include a home visit at which the child is viewed, if appropriate." Id. If the investigation discloses "reasonable cause to believe that the removal of the child is necessary to protect him from further abuse or

neglect," DSS may take the child into its custody immediately. Mass. Gen. L. ch. 119, § 51B(3). In other cases, DSS may petition a court for an order placing the child in its custody. Mass. Gen. L. ch. 119, § 24.

To be sure, the States also have an interest in prosecuting as criminal acts at least the more serious forms of child abuse.[4/] However, statistics show that the expressed protective purpose[5/]

4/ For that reason, in Massachusetts for example, DSS must, by statute, refer to prosecutorial authorities certain criminal conduct that comes to its attention. See, e.g., Mass. Gen. L. ch. 119, § 51B(4) (requiring report where child has died; has been sexually assaulted or exploited; or has suffered brain damage, loss or substantial impairment of bodily function or organ, or has been disfigured).

5/ See Mass. Gen. L. ch. 119, § 1, quoted at p. 14, supra.

of the statutory scheme is paramount. For example, in Massachusetts, DSS records indicate that DSS makes reports to district attorneys regarding only about 7.3% of all the children about whom it receives reports of abuse or neglect. Approximately 95% of those cases involve sexual, rather than physical abuse. The proportion of physical abuse cases referred to prosecutors is extremely small. (See note 2, supra.) Thus, as the governing statutes indicate, e.g., Mass. Gen. L. ch. 119, § 1, and as statistics show, the child protection agencies' overriding purpose, and the focus of their efforts, is not to punish parents for past crimes against their children, but to protect the child victims from further harm.

In the course of performing their child protective functions, the child protection agencies have developed substantial expertise in the investigation of suspected child abuse and neglect. From their accumulated experience, these agencies have come to the unanimous view that direct visual observation of the child is a crucial aspect of every child protective investigation.[6/] The implications of the decision of the Maryland Court of

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6/ Because of the widely recognized importance of examining the child, some child protection agencies have promulgated regulations requiring that every investigation include examination of the child. For example, the Massachusetts regulations require a visual examination in every case, and, in fact, make it the "first priority" in an emergency case. Mass. Regs. Code tit. 110, § 4.26(1) (1988). See also Child Abuse and Neglect Investigations Handbook of the Illinois Department of Children and Family Services, noted in Darryl H., 801 F.2d. at 896.

Appeals would be to prevent a child protection agency from effectively investigating many serious instances of alleged abuse. This conclusion is consistent with "common sense alone[;] . . . there is no quicker way of knowing whether a child is at grave risk than by an actual examination of the child." Darryl H., 801 F.2d at 899 (quoting District Court finding).

Direct observation of a reportedly abused or neglected child enables the investigator to gauge the child's overall condition and demeanor, to detect bruises or other physical evidence of abuse, and to evaluate the child's nutritional status and hygiene. By these methods, the investigator can determine, as quickly and accurately as possible, whether physical evidence supports the report, and whether the child is in immediate danger. See Id.;

Bourne & Newberger, "Family Autonomy" or "Coercive Intervention"? Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect, 57 B.U.L. Rev. 670, 704 (1977).

The importance of viewing the child does not depend on the nature or severity of the mistreatment reported. As child protection agencies have learned from repeated experience, the most severe instances of child abuse sometimes come to their attention through reports of neglect. Not infrequently, investigators discover an urgent need for intervention only upon observing a reportedly neglected child who exhibits physical evidence indicating life-threa ening abuse.

Beyond the investigative stage, once a child is identified as having suffered abuse or neglect, it is obvious that any effort to protect that child from

further harm depends on access to the child. Effective monitoring of the child's continued well-being within the family requires repeated direct observation. Further, when a child must be removed from the family, the removal itself necessarily requires physical access.

On the basis of their experience, child protection agencies have come to the firm and unanimous conclusion not only that their direct access to victims of child abuse or neglect is crucial to the effectiveness of their efforts to protect such children, but also that in most cases they must depend for such access on the cooperation (whether voluntary or compelled) of the child's parents or other custodians. In the agencies' experience, their access to a child almost always depends on the

actions of the child's parent or other custodian. While access may at times be gained at the child's school, day care center, or the like, or through a search of the child's home or some other location where the child is known to be, these methods cannot substitute for parental cooperation. A parent's control over a minor child, particularly in the early years, enables the parent to move the child from the home, to secrete the child away from any place that authorities might search, and thus to thwart efforts to locate the child. This very case vividly illustrates the practical power of a parent determined to hide a child from authorities.

In most cases, parents voluntarily permit the child protection agency access to their children, both during investigations and in connection with

ongoing protective services.[7/] Resistance occurs frequently enough, however, that child protection agencies have adopted tools for responding to it. The agencies' principal tool is persuasion, either by their own personnel, or at times by police. Where necessary, however, the agencies may resort to seeking court orders compelling access. The ultimate availability of such orders, the agencies believe, contributes substantially to their ability to persuade most parents or custodians to permit access voluntarily.

Massachusetts law and practice illustrate a typical child protection

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7/ The protective service agreement between the parties in this case, as quoted at p. 2 of Respondent's Brief in Opposition to the Petition for Writ of Certiorari, is typical of service agreements employed by child protection agencies and approved by courts daily.

agency's approach. By regulation, an investigator faced with a parent's refusal of access to the child may first seek police aid, and may consider invoking a judicial remedy. Mass. Regs. Code tit. 110, §§ 4.26(3), 4.27(3) (1988). Under Mass. Gen. L. ch. 119, § 24, a court receiving a petition for the care and protection of a child "may issue a precept to bring such child before said court." In practice, these precepts are fulfilled by the child's parents or custodians, after being served on them by a police officer or social worker. However, Massachusetts courts have consistently relied on the ultimate possibility of resort to the contempt power to compel compliance with these orders. In the experience of the Massachusetts DSS, the existence of this mechanism to compel access not only

provides a means of last resort, but also tends to induce voluntary cooperation.

If affirmed, the decision of the Maryland Court of Appeals would significantly impair the States' ability to protect children. Precisely because acts constituting child abuse or neglect are also frequently criminal acts, the analysis employed by the Court of Appeals of Maryland has dramatic negative implications for the protection of children.

In any case of abuse or neglect, the child's physical condition may supply evidence of crime, as well as evidence of the child's need for protection. Thus, under the Maryland Court's analysis, any parent or custodian who has committed -- or who might be suspected of -- a crime involving child abuse or neglect has a constitutional

right to refuse to produce the child for examination, even in the absence of any criminal investigation or prosecution. That right, as defined by the Maryland Court, would prevail over the child's need for protection, no matter how urgent, and would constitute an absolute defense to non-compliance with a court order requiring production of the child.

Under the Maryland Court's ruling, child protection agencies would be deprived of any means to compel access to children in need of protection, as well as of a significant tool in their efforts to induce voluntary cooperation. Amici believe that that result would significantly impair the agencies' ability to protect large numbers of children in situations of severe jeopardy, with potentially life-threatening consequences to those

children. That result is legally and morally unacceptable.

II. THE RESPONDENT MAY PROPERLY BE HELD IN CONTEMPT FOR FAILURE TO PRODUCE THE CHILD BECAUSE THE ACT OF PRODUCING THE CHILD IS NOT A TESTIMONIAL COMMUNICATION.

The privilege against self-incrimination is an exception to the rule that citizens have a social obligation to come forward with evidence. Miranda v. Arizona, 384 U.S. 436, 477-78 (1966); see also Branzburg v. Hayes, 408 U.S. 665, 688 (1972). Unless the Fifth Amendment privilege applies, the respondent here "no less than any other citizen is obliged to assist the authorities." Roberts v. United States, 445 U.S. 552, 558 (1980); see also United States v. Washington, 431 U.S. 181, 189 (1977).

The Fifth Amendment's mandate that no person "shall be compelled in any

criminal case to be a witness against himself" protects only against compelled,[8/] testimonial communications that are incriminating. Fisher v. United States, 425 U.S. 391, 409 (1976); see also Doe v. United States, ("Doe II") 108 S.Ct. 2341, 2346 (1988).

The Fifth Amendment is not violated by the order to produce the child, because the act of producing Maurice would not be testimonial; by producing him, the respondent would not be a witness, but only a source of "real or physical evidence." See Schmerber v. California, 384 U.S. 757, 764 (1966). An order to produce Maurice is analogous to an order to submit to a blood test, Schmerber, 384 U.S. at 764-65; to stand

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8/ There is no question that the contempt judgment below and the commitment imposed thereon constitutes compulsion. See Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

in a line-up and speak words used by a robber, United States v. Wade, 388 U.S. 218, 222-23 (1967); to provide a handwriting exemplar, see Gilbert v. California, 388 U.S. 263, 265-66 (1967); to provide a voice exemplar, United States v. Dionisio, 410 U.S. 1, 5-7 (1973); to provide items of clothing, Warden v. Hayden, 387 U.S. 294, 302 (1967); to wear certain clothing, Holt v. United States, 218 U.S. 245, 253 (1910); to surrender a passport, United States v. Friedman, 593 F.2d 109, 118 (9th Cir. 1979); and to produce business records, United States v. Doe, 465 U.S. 605, 612 (1984) ("Doe I"). Compelled performance of these acts does not violate the Fifth Amendment because none of these acts requires the subject of the compulsion order "to speak his guilt." Wade, 388 U.S. at 222-23.

Physical production of the child must be distinguished from disclosure of his whereabouts. Compelling his production is like being forced to surrender a key to a strong box containing possibly incriminating documents but is unlike being "compelled to reveal the combination to [a] wall safe. (citation omitted)." Doe II, 108 S. Ct. at 2347 n.9. This "bifurcated approach," New York v. Quarles, 467 U.S. 649, 668 (1984) (O'Connor, J., concurring) to real and testimonial evidence is well established.[9/] Indeed, it has been

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9/ In Schmerber, 384 U.S. at 765 n.9, the Court distinguished between the results of blood tests themselves (the physical evidence) and "any testimonial products of administering the test -- products which would fall within the privilege." (emphasis original). See also Wade, 388 U.S. at 223 (Court distinguishing between the line-up identification procedure itself and what was said at the procedure); Michigan v. Tucker, 417 U.S. 433, 445 (1974) (Court

(footnote continued)

suggested that physical evidence such as a gun, discovered as a result of an improperly "compelled" (in the Miranda[10/] sense) testimonial

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(footnote continued)

distinguishing between the testimony of an alibi witness identified by the defendant before defendant had received complete Miranda warnings, and the defendant's own statements); Wilson v. United States, 221 U.S. 361, 377 (1911) (Court distinguishing between corporate records and oral testimony from defendant); Doe II, 108 S.Ct. at 2347 n.9 and at 2348 n.10 ("the Schmerber line of cases does not draw a distinction between unprotected evidence sought for its physical characteristics and protected evidence sought for its content. Rather, the court distinguished between the suspect's being compelled himself to serve as evidence and the suspects's being compelled to disclose or communicate information or facts that might serve or lead to incriminating evidence.")

10/ Miranda v. Arizona, 384 U.S. 436 (1966).

response (as to the location and ownership of the gun), is nonetheless, and as distinct from the testimonial aspects of the response, admissible. Quarles, 467 U.S. at 665, 667 (O'Connor, J., concurring); but see Commonwealth v. Hughes, 380 Mass. 583, 592, 404 N.E.2d 1239, 1244, cert. denied, 449 U.S. 900 (1980). Under this analytically sound approach, compliance with the order to produce Maurice would not be testimonial.

The only "contents of [her] own mind," Curcio v. United States, 354 U.S. 118, 128 (1957), that the respondent arguably might be compelled to communicate by complying with the order to produce Maurice would be the acknowledgement that the child is Maurice and that the respondent has sufficient control over him to produce him. See Doe II, 108 S.Ct. at 2347; Braswell v. United

States, 108 S.Ct. 2284, 2288 (1988); Doe I, 465 U.S. at 614 n.13. However, because respondent is Maurice's parent, and because she has legal custody of him (which is already the subject of state involvement)[11/] these arguably implicit testimonial communications are self-evident "foregone conclusions" and therefore have "minimal testimonial significance," Fisher, 425 U.S. at 411-12, which do not rise to the level of "testimony" within the protection of the Fifth Amendment. Id. at 410-13; see also United States v. Osborn, 561 F.2d 1334, 1339 (9th Cir. 1977), and cases cited.

The Maryland Court of Appeals erred in concluding that production of the child was "testimonial" because it would amount to production of the "corpus

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11/ In re Maurice M., 314 Md. 391, 550 A.2d 1135, 1136 (1988).

delicti." In re Maurice M., 314 Md. 391, 550 A.2d 1135, 1141 (1988). Contrary to the Court's suggestion, the order to produce the child was not an order to produce "the crime itself." United States v. Campos-Serrano, 430 F.2d 173, 176 (7th Cir. 1970) (forged alien registration receipt card) aff'd, 404 U.S. 293 (1971); cf. State v. Dennis, 16 Wash. App. 417, 558 P.2d 297 (1976) (cocaine); State v. Alexander, 281 N.W.2d 349 (Minn. 1979) (obscene film); Hughes, 380 Mass. at 592, 404 N.E.2d at 1244 (defendant licensed to own firearm could not be compelled to produce it for ballistics test).[12/]

12/ In fact, in Campos-Serrano, the Court distinguished between the first, non-criminal, immigration inquiry whether the defendant was lawfully in the country, which inquiry did not violate the defendant's Fifth Amendment privilege, and the second inquiry for "the crime itself," the forged cards that had previously been examined.

Rather, the order to produce the child was an essentially neutral request. Cf. United States v. Sullivan, 274 U.S. 259, 263-64 (1927) (requirement to file income tax return is neutral on its face); California v. Byers, 402 U.S. 424, 430-31 (1971) (requirement to report automobile accident is neutral on its face). The primary aim of the order to produce was not to secure evidence for a criminal prosecution[13/] but to assure protection of a child pursuant to an order that required the respondent not to abuse the child and to cooperate with the petitioner Department of Social

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13/ cf. Hughes, 380 Mass. at 591-92, 404 N.E.2d at 1244 (order to produce gun for ballistics test); Albertson v. SACB, 382 U.S. 70, 79 (1965) (statute requiring registration as member of Communist Party); Haynes v. United States, 390 U.S. 85, 96-97 (1968) (statute requiring registration of firearms); Leary v. United States, 395 U.S. 6, 18 (1969) (statute imposing tax on transfers of marijuana).

Services, In re Maurice M., 550 A.2d at 1136-37. Cf. Byers, 402 U.S. at 432 (disclosure of name and address of driver involved in accident is an essentially neutral act); Shapiro v. United States, 335 U.S. 1, 32 (1948) (defendant's records used to prosecute him for violation of Price Control Act), reh'g denied, 335 U.S. 836 (1948); Sullivan, 274 U.S. at 263-64 (filing of tax returns required even though it might reveal violations of Prohibition Act; it would "be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime"). Thus, the incidental possibility of self-incrimination is not enough to excuse non-compliance with the order to produce.

The Maryland Court of Appeals also erred in concluding that the production of the child was testimonial because it might reveal that Maurice has been subject to criminal abuse or is dead. See In re Maurice M., 550 A.2d at 1141. Because the compelled production is "not testimonial and for that reason not protected by the privilege, it cannot become so because it [may] lead to incriminating evidence." Doe II, 108 S.Ct. at 2346 n.6, quoting In re Grand Jury Subpoena, 826 F.2d 1166, 1172 n.2 (2d Cir. 1987) (concurring opinion), cert. denied sub nom. Coe v. United States, 108 S.Ct. 2870.

That an examination of Maurice might yield incriminating evidence of child abuse does not transform the nontestimonial quality of the act of production into a testimonial

communication. See Doe II, 108 S.Ct. at 2346 n.6. Respondent's making Maurice available for examination is no different from an individual's making himself available for a blood-alcohol test. The government would still be required to locate evidence of criminality "by the independent labor of its officers." Doe II, 108 S.Ct. at 2350, quoting Estelle v. Smith, 451 U.S. 454, 462 (1981).

The record indicates that the respondent has never asserted that she would not be able to produce Maurice. To the contrary, she insisted first that Maurice was with an aunt (unidentified) and then that he was with her sister at an address in Texas. In re Maurice M., 550 A.2d at 1137. In essence, the respondent has refused to act. Where the act is nontestimonial, punishment for the refusal to act violates no Fifth Amendment right. See Deering v. Brown,

839 F.2d 539, 541-42 (9th Cir. 1988) (refusal to take blood alcohol test not testimonial); see also South Dakota v. Neville, 459 U.S. 553, 560-61 n.11 (1983) (Court recognizing that the view that refusal to take blood alcohol test is not testimonial has force, but declining to rest its decision that the refusal is admissible on that basis); United States v. Toussie, 410 F.2d 1156, 1160 (2d Cir. 1969) (defendant's privilege against self-incrimination was not violated by his failure to register for selective service on ground he could not register without incriminating himself; defendant's inaction did not give rise to threat of punishment beyond what he already risked), rev'd on other grounds, 397 U.S. 112 (1970); see also Baxter v. Palmigiano, 425 U.S. 308, 318-20 (1976) (prison disciplinary board may draw adverse inference from silence); Jenkins

v. Anderson, 447 U.S. 231, 235-36 (1980) (defendant may be impeached with silence).

For the foregoing reasons, the Court of Maryland erred when it concluded that production of the child was testimonial and that the juvenile court could not compel, under penalty of contempt, the respondent to produce him.

III. ASSUMING ARGUENDO THAT PRODUCTION OF THE CHILD IS "TESTIMONIAL," THEN, ON BALANCE, PRODUCTION MAY NONETHELESS BE LAWFULLY COMPELLED BECAUSE THE PUBLIC INTEREST IN PROTECTING CHILDREN IS PARAMOUNT.

A conclusion by this Court that compliance with the order to produce the child would be testimonial and would implicate the respondent's Fifth Amendment right should not necessarily end the Court's inquiry. This Court has long recognized that societal interests must be taken into consideration when determining the proper reach of the

privilege against self-incrimination. See, e.g., Byers, 402 U.S. at 427. Indeed, even in the purely criminal context, this Court has recognized that the "scope of the privilege [does not coincide] with the complex of values it helps to protect," Schmerber, 384 U.S. at 762. Similarly, in refusing to extend the scope of the privilege to corporate record keepers, this Court has recognized that extending the privilege may have a negative impact on the Government's efforts to prosecute crime. See Braswell, 108 S.Ct. at 2294. As this Court has stated:

> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the

> individual claim to constitutional protections on the other; neither interest can be treated lightly.

Byers, 402 U.S. at 27.

Here, where the primary purpose of the statutory scheme that would permit the taking of a child into custody or an order to produce the child[14/] is to protect children, the balance tips away from the respondent's Fifth Amendment right in favor of protecting the child in jeopardy. Cf. United States v. Vaught, 434 F.2d 124 (9th Cir. 1970) (requiring

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14/ The Maryland trial court had the statutory power of contempt to compel the unwilling custodian to produce the child before the court. See Md. Courts and Judicial Proceedings Code Ann. § 3-814(c) ("If a parent, guardian, or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt.")

reporting of amphetamines at customs point), cert. denied, 401 U.S. 976 (1971); Wynn v. United States, 422 F.2d 1245 (9th Cir. 1970) (requiring disclosure of marijuana smuggled into United States); United States v. Flores, 753 F.2d 1499 (9th Cir. 1985) (requiring reporting of intent to ship firearms). See also Quarles, 467 U.S. at 665-66 ("the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination"); United States v. Webb, 755 F.2d 382, 392 n.14 (5th Cir. 1985) (failure to give Miranda warnings no bar to admissibility of statements where negotiators' primary purpose was to prevent defendant's threatened suicide), reh'g denied en banc, 762 F.2d 1004 (5th Cir. 1985).

Where the primary purpose of a statutory scheme is not to facilitate criminal convictions, but rather is neutral on its face and is not directed at a "highly selective group inherently suspect of criminal activities," Byers, 402 U.S. at 430, the balance of interest tips in favor of requiring "disclosure." Id.; cf. Shapiro, 335 U.S. at 33; Sullivan, 274 U.S. at 263-64; United States v. Des Jardins, 747 F.2d 499, 508-09 (9th Cir. 1984); United States v. Grotke, 702 F.2d 49 (2d Cir. 1983); United States v. Carlson, 617 F.2d 518 (9th Cir.), cert. denied, 449 U.S. 1010 (1980).

The statutory scheme in this case, which permits a child to be taken into custody and the court to request his production, see n. 14, supra, is not directed at a "highly selective group

inherently suspect of criminal activities." Byers, 402 U.S. at 430. Although the request to produce the child is directed at "a parent, guardian or custodian"[15/] of a child who is the subject of investigation, [16/] this group is neither "highly selective" nor "inherently suspect of criminal activity." Because the group encompasses all who might possibly have custody of a child, see Md. Code Ann. § 3-801, it would be untenable to suggest that it is "highly selective." Further, it is not a crime, in and of itself, to be the parent, guardian, or custodian of a child who has been abused. While the perpetrator of abuse may indeed be

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15/ Md. Code Ann. § 3-814(c).

16/ Child protection schemes generally contain a provision compelling production of the subject child. See, e.g., Mass. Gen. L. ch. 119, § 24; Cal. Welf. & Inst. Code §338 (West). See pp. 24-25, supra.

one of these individuals, he may not necessarily be so: the child may have suffered abuse at the hand of some other caretaker, such as a teacher, relative, or other household member.

Moreover, a statutory scheme compelling the production of a child whose safety is in question is not "intended to facilitate criminal convictions," Byers, 402 U.S. at 430, but rather constitutes one component of an overall scheme designed to protect children who may be the subjects of abuse and neglect. See pp. 15-16, supra. That these laws require a child protection agency to investigate suspected cases of abuse and provide support services where necessary, illustrates that the laws are designed to promote the welfare of children. The possibility that a child protection agency's investigatory efforts

might provide "a link in the chain of evidence," Byers, 402 U.S. at 432, quoting Hoffman v. United States, 341 U.S. 479, 486 (1951), leading to the prosecution and conviction of an individual for child abuse does not work to transform the statutory scheme from a protective to a criminal one. Cf. Marchetti v. United States, 390 U.S. 39, 56-57 (1968) (Court striking down "ingeniously drawn legislation," the aim of which was to obtain evidence from persons involved in criminal activity for use in their prosecution).

This Court has recognized that child abuse is especially difficult to detect. See Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987). Visual observation of a child is a vital tool with which to ascertain whether the child has been the victim of abuse. See pp. 18-21, supra. Here, the

compelling interest in favor of production decisively outweighs whatever limited incriminating effect production of the child might cause for the custodian. A holding that the Fifth Amendment privilege allows a parent or custodian to conceal from a child protection agency the physical condition of a child would all but render it impossible for such agencies to fulfill their statutory mandates. In that event, many cases of abuse would go undetected and many children would be left unprotected.

IV. THE EXTENSION OF IMMUNITY TO A RECALCITRANT PARENT OR CUSTODIAN IS NOT A SATISFACTORY TOOL TO PROTECT CHILDREN FROM ABUSE AND NEGLECT.

Assuming for purposes of argument that production of a child is testimonial, the extension of immunity

from prosecution, pursuant to which the State might be able to compel production of the child,[17/] is not a solution to the Fifth Amendment question raised in this case and it is not an appropriate response to the States' need to protect children from abuse.

The States should not be required to choose between protecting children and punishing those who abuse them. Moreover, child abusers should not be able to avoid prosecution by refusing to produce, until immunity is extracted, a child who is in jeopardy; otherwise, the incentive to hide the child would become too powerful.

Further, the extension of immunity, if available, would not guarantee

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17/ See Kastigar v. United States, 406 U.S. 441, 458 (1980), reh'g denied, 408 U.S. 931 (1981).

cooperation by the parent or custodian or expeditious access to a child at risk. A grant of immunity need only be "as broad as . . . the privilege against self-incrimination, Murphy v. Waterfront Comm'n, 378 U.S. 52, 107 (1964) (White, J., concurring)," motion denied, 379 U.S. 898 (1964); Doe I, 465 U.S. at 617 n.17. Use immunity, whereby the witness is protected from the use in any criminal proceedings against him of his testimony or other information compelled from him under oath, is constitutionally sufficient. Kastigar v. United States, 406 U.S. 441, 449, 453 (1972) reh'g denied, 408 U.S. 931 (1972).[18/] Under a use immunity scheme, the State

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18/ Some States provide only for use immunity, although a majority provide for the broader transactional immunity. See National Ass'n of Attorneys General, Organized Crime Control Legislation (1974 and 1979 Supp.).

may still prosecute the immunized witness if it can show that it has an "independent, legitimate source for the disputed evidence." Murphy, 378 U.S. at 79 n.18. Thus, a parent or custodian given use immunity might refuse to cooperate for fear that a prosecution may follow in any event on the basis of the information from independent sources. Thus, she may be willing to bear the sanction for refusing to produce or disclose the whereabouts of the child rather than risk harsher penalties following a criminal prosecution. See Piccirillo v. New York, 400 U.S. 548, 568 (1971) (Brennan, J., dissenting); Tierney v. United States, 409 U.S. 1232, 1233-34 (1972); In the Matter of Vance A., 105 Misc.2d 254, 432 N.Y.S.2d 137, 141 n.7 (1980). See also LaFave and Israel, Criminal Procedure, Vol. 1, §8.11 (1984).

On the other hand, under the broader transactional immunity scheme, whereby the witness is immunized from prosecution for the offense concerning which she testifies regardless of the source of the evidence, see Kastigar, 406 U.S. at 449-50,[19/] a parent or custodian given immunity might also refuse to cooperate: the custodian may give incomplete or unhelpful information, recognizing that limited information will gain her full immunity from prosecution. See LaFave, supra. This will not aid a child at risk; it will not ensure that the child is found or that he will receive the immediate medical, psychological, or social care he needs.

19/ In Massachusetts, for example, transactional immunity is mandated as a matter of state constitutional law. Mass. Gen. L. ch. 233, § 20G; Attorney General v. Colleton, 387 Mass. 790, 444 N.E.2d 915 (1982).

Further, immunity extended under either system would not guarantee expeditious access to a child who may have been hidden by his parent or custodian. There could be many reasons in addition to fear of criminal prosecution which could motivate the parent or custodian not to produce the child or disclose his whereabouts, including: fear of termination of parental rights or custody, see Lassiter v. Department of Social Services, 452 U.S. 18, 27 n.3, 31 (1981) (Court recognizing that termination of parental rights is commonly based on alleged criminal activity), reh'g denied, 453 U.S. 927 (1981), Ullman v. United States, 350 U.S. 422, 430-31 (1956) (immunized testimony admissible in civil proceedings), reh'g denied, 351 U.S. 928 (1956), and In the Matter of Vance A.,

432 N.Y.S.2d at 141 n.7; fear of personal disgrace, Smith v. United States, 337 U.S. 137, 147 (1949); or fear of reprisal by another person who may be a co-perpetrator, see Piemonte v. United States, 367 U.S. 556, 558-59 (1961). The extension of immunity will not resolve these issues.[20/]

Immunity is not expeditiously or easily obtained. In Massachusetts, for example, a strict and time-consuming statutory procedure must be followed. Petition of the District Attorney for the Plymouth District, 391 Mass. 723, 726-27, 464 N.E.2d 62, 64-65 (1984), aff'd,

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20/ It should also be noted that immunity may not always be available as a matter of state law. For example, child abuse or neglect per se is not a crime in Massachusetts. Thus child abuse per se is not one of the listed crimes for which witness immunity is available in Massachusetts, Mass. Gen. L. ch. 233, §20D.

Palaza v. Superior Court, 393 Mass. 1001, 469 N.E.2d 60 (1984). In order for a witness to receive immunity, a district attorney or the Attorney General must convene a grand jury, initiate a grand jury proceeding and then call the witness before the grand jury. Mass. Gen. L. ch. 233, § 20E. Absent an active criminal investigation, the prosecutor may not call the witness to the grand jury merely to determine if she will invoke the Fifth Amendment. Petition of the District Attorney, 391 Mass. at 727, 464 N.E.2d at 65. After the witness invokes her Fifth Amendment rights, the district attorney or Attorney General must apply to a Single Justice of the Supreme Judicial Court for a grant of immunity. Mass. Gen. L. ch. 233, § 20E. If the Single Justice denies the petition for immunity,

that decision is unreviewable. See Petition of the District Attorney for the Northern District, 399 Mass. 1001, 502 N.E.2d 511 (1987).

As applied to a case like this one, the statutory immunity scheme set forth, for example, in Mass. Gen. L. ch. 233, §20C-20I would effectively transform an expeditious civil proceeding designed to locate and protect a child in danger of imminent physical injury or death into a cumbersome and time-consuming criminal proceeding. Such a result is unacceptable. Child protection agencies must be able to move expeditiously because "prompt conclusion of child abuse proceedings is essential to child welfare." In the Matter of Vance A., 432 N.Y.S.2d at 143; see also Darryl H., 801 F.2d at 899.

For the foregoing reasons, the availability of immunity is not a satisfactory answer to the Fifth Amendment question raised in this case.

CONCLUSION

In order to preserve the ability of the states to protect children in jeopardy from abuse or neglect, the decision below should be reversed.

Respectfully submitted,

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